

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED-GENERAL NUCLEAR SERVICES, ALLIED  
CHEMICAL NUCLEAR PRODUCTS, INC. and VALLEY  
PINES ASSOCIATES,

*Petitioners*

v.  
THE UNITED STATES,

*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

**PETITIONERS' REPLY**

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## TABLE OF AUTHORITIES

CASES:	Page
<i>Connolly v. Pension Benefit Guaranty Corp.</i> , 475 U.S. 211 (1986) .....	3
<i>First English Evan. Luth. Ch. v. Los Angeles Cty.</i> , 107 S.Ct. 2378 (1987) .....	2
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979) .....	3,5,6
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 107 S.Ct. 1232 (1987) .....	2
<i>MacDonald, Sommer &amp; Frates v. Yolo County</i> , 106 S.Ct. 2561 (1986) .....	7
<i>Monongahela Navigation v. United States</i> , 148 U.S. 312 (1893) .....	5
<i>Mugler v. Kansas</i> , 123 U.S. 623 (1887) .....	2
<i>Nollan v. California Coastal Comm'n</i> , 107 S.Ct. 3141 (1987) .....	6,7,8
<i>Pennsylvania Coal v. Mahon</i> , 260 U.S. 393 (1922) .....	2,6
<i>Power Reactor Co. v. Electricians</i> , 367 U.S. 396 (1961) .....	3
<i>Ruckelshaus v. Monsanto</i> , 467 U.S. 986 (1984) .....	4,5
<i>Westinghouse Electric Corp. v. United States</i> , 598 F.2d 759 (3d Cir. 1979) .....	4,8
CONSTITUTION, STATUTES AND REGULATIONS:	
U.S. Constitution, Just Compensation Clause .....	<i>passim</i>
U.S. Constitution, Article I, section 8 .....	6
Nuclear Waste Policy Act of 1982, 42 U.S.C. §§10101 <i>et seq.</i> .....	7
50 F.R. 45598 (1985) .....	7



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The opposition to certiorari fails to answer—for the most part, it has not even addressed—the compelling reasons we advanced for this Court to review the Court of Appeals' decision.

1. The Court of Appeals' central holding, which it said was "dispositive" (Pet.App.A 8a), rested on the so-called "nuisance" or police power exception to the guarantee of Just Compensation. Weakly inviting this Court to overlook this critical ruling, the opposition

states simply that "*Mugler* and its progeny" have not been overruled (Opp.12-13). But we do not argue that *Mugler* has been overruled. Instead, we showed in the petition that the "nuisance" doctrine has no proper application in this case (Pet.12-16), a point with which the opposition fails to come to grips.

The Court of Appeals held that any government regulation, whose stated purpose is to prevent injury to "health, safety, and welfare", may completely destroy private property without Just Compensation. (Pet.App.A 9a-10a). The opinion states (Pet.App.A 8a-9a)

in *Keystone Bituminous Coal Ass'n v. De-Benedictis*, 107 S.Ct. 1232 (1987), the Supreme Court has dusted off *Mugler* and put it back on its pedestal, while reducing *Pennsylvania Coal Co. v. Mahon* as a precedent pretty much to its own peculiar facts.

This case squarely presents the question whether this view of regulatory takings law is correct. The government nowhere disputes that the Court of Appeals' broad reading of the "nuisance" doctrine, if it prevails, would substantially eviscerate the law of regulatory takings. Nor does the government contest that the lower courts are split and that the issue is of national significance.

The scope of the "nuisance" exception is an important and recurring question that was left open in *Keystone* and in *First English Evan. Luth.Ch. v. Los Angeles Cty.*, 107 S.Ct. 2378 (1987). This Court should now decide the question.

2. The United States also fails in its strained attempts to find some alternative ground to support the judgment below.

(a) The opposition asserts that, under the Atomic Energy Act licensing statute, AGNS "willingly" and "knowingly assumed the investment risk" (Opp. 8-12). Yet not a word is said by the government about the over 20 years of government *inducements* that validly *interpreted* the statute<sup>1</sup> and deliberately created petitioners' reasonable investment-backed expectations that the government would continue to support and encourage (not outlaw) commercial reprocessing. This Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), makes it clear that government inducements, promises (or even "acquiescence") at the level of statutory interpretation or administration, below the level of statutes, can create reasonable investment-backed expectations whose destruction requires Just Compensation.

There was no discussion of government inducements in *Power Reactor Co. v. Electricians*, 367 U.S. 396 (1961) or *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), relied on by the government (Opp. 9-11). The very fact that the 1954 statute gave notice of some risks (see Opp. 9) may explain why the government embarked upon its major 20-year program of inducements, giving assurances of continued government support for reprocessing under the statute (*i.e.*, giving assurances against some risks) and deliberately creating reasonable investment-backed

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<sup>1</sup> The government does not claim, nor could it, that this major program of government inducements was invalid, *ultra vires*, or inconsistent with the Atomic Energy Act licensing statute.

expectations "to encourage private industry to build and operate" commercial plants to reprocess spent nuclear fuel (see Pet.3).

Overlooked by the government is the fact that, where government inducements or assurances to the claimant were present in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (cited in Opp.11), this Court found a compensable taking of property. There this Court held that the impact of a statute, giving assurances of confidential treatment for trade secrets submitted to the government between 1972 and 1978, created "reasonable investment-backed expectations" so that public disclosure of that data by the government would be a compensable taking of property. 467 U.S. at 1010-1016. In 1978 regulatory policy changed so that similar trade secrets submitted to the government after 1978 might be publicly disclosed, at the submitter's own risk. Yet this did not define out-of-existence the compensable taking of earlier-created property. Our case is similar.

The government suggests that, under the Atomic Energy Act, it had the right to switch policy and outlaw commercial reprocessing *for any reason*, at any time, and in any manner (see Opp.8-12). But as shown in the petition (see Pet.16-22), this view was rejected by the Third Circuit in *Westinghouse Electric Corp. v. NRC*, 598 F.2d 759 (1979). Moreover, the impact of the government's inducements (systematically ignored by the opposition) means that AGNS did *not* take the risk that the government would unexpectedly reverse policy and outlaw the whole idea of commercial reprocessing. The government nowhere comes to grips with the point that the Court of Appeals' denigration of the importance of government

inducements under the Taking Clause is in conflict with the principles of *Kaiser Aetna*, *Monsanto* and *Monongahela*.

(b) The United States also makes a variety of specious claims that were not accepted by the Court of Appeals or the Claims Court below. Yet none of these claims supports the summary judgment below.

The only viable economic use of the Plant by its owners, for commercial reprocessing of spent nuclear fuel, was outlawed by the 1977 ban on commercial reprocessing. The Court of Appeals said that the Barnwell Plant was "completely useless" (Pet.App.A 1a) and "a \$200,000,000 but useless facility" (Pet.App.A 6a).<sup>2</sup>

The government now concedes "that the Barnwell Plant is property", but it claims that the Plant had no "value as a reprocessing facility" before final licensing (Opp. 9 & n.4) and that this precludes a compensable taking. This claim is contradicted by the record.<sup>3</sup> More importantly, acceptance of this sweep-

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<sup>2</sup> There is no basis for the government's claim that "[i]n this case, petitioners have not shown that they were denied all productive use of their land." (Opp. 12 n.7). The Claims Court opinion did say that "the parties disagree as to the remaining uses to which the property might be put (as well as any economic valuations)." Pet.App.B 24a n.6. But it is not fairly open to dispute that "all productive use" of the single-purpose Barnwell reprocessing Plant was outlawed by the government's ~~ban~~ on commercial reprocessing.

<sup>3</sup> The only evidence in this record on the point shows that, before final licensing and before the 1977 ban, the Barnwell Plant had a \$394 million market value as a reprocessing facility. See Pet. 8 n.5. AGNS' cross-motion left open, for further adjudication, the exact measure of damages owing by the government.

ing government contention would eviscerate regulatory takings law.

The same claim made by the government here could be made in every case involving property—such as mines, hotels, or marinas—that requires some sort of license before it can be used. Indeed, all private property today is subject to the government's power to make “all necessary and proper laws” (U.S. Const. Article I, section 8). This Court has never accepted the government's claim, however, that this sort of “antecedent acceptance of the regulatory scheme” forecloses Just Compensation where regulated property is taken or destroyed. To the contrary, Taking Clause cases where the claimant prevails *commonly* involve a “pre-existing regulatory scheme” that might have some adverse effects on the claimant's property interests. See, e.g., *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141, 3146 n.2 (1987) [court finds regulatory taking and also states that claimants' rights were not “altered because they acquired the land well after the Commission had begun to implement the policy”]; *Kaiser Aetna* [marina held taken, despite pre-existing regulatory scheme applicable to navigable waters]; *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) [coal mines held taken, despite pre-existing regulatory regime regulating many aspects of coal mining].

(c) The government asserts that AGNS “apparently abandoned the Barnwell project for economic reasons. See C.A.App. 317.” (Opp. 13 n.8). What the record actually shows, however, is that the Barnwell project was destroyed by the government's ban on commercial reprocessing. AGNS did not voluntarily “abandon” the project.

don" the project. AGNS' May 1983 letter that is cited by the government (C.A.App. 317), expressing AGNS' doubts about the commercial viability of the Barnwell Plant, was written *after* the enactment of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§10101 *et seq.* (January 7, 1983), which provides for the disposal of spent nuclear fuel—not by reprocessing—but by transferring it to the government for storage as "waste". As shown in the petition (Pet.8, 25 n.14), after the 1977 ban killed the Barnwell project, the government's regulatory actions since 1977<sup>4</sup> have ensured that the commercial reprocessing industry and the Barnwell Plant cannot be revived.<sup>5</sup> The moratorium itself is ongoing (see 50 F.R. 45598 (November 1, 1985)).

3. This case also presents the question whether the Court of Appeals improperly ignored *Nollan* and cre-

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<sup>4</sup> The Court of Appeals held that, "the fact still remains that between April 7, 1977, when President Jimmy Carter announced his policy, and October 8, 1981, when President Ronald Reagan announced his, no administrative remedy existed not obviously futile and a waste of time." (Pet.App.A 7a). After October 1981 the government enacted the Nuclear Waste Policy Act and also (see 50 F.R. 45598) reaffirmed the 1977 ban.

<sup>5</sup> The opposition fails to address our demonstration (Pet.24-26) that it was the *government's* burden (not AGNS' burden) to reopen GESMO and restore the regulatory *status quo ante* that existed before the 1977 ban, if the government wished to limit its liability to "temporary taking" damages. Contrary to the government's suggestion (Opp.6, 13 n.8), the series of government actions since 1977 makes it clear that commercial reprocessing is dead and that it would have been "patently fruitless" (*MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2572 (1986) (White, J., dissenting, joined by Burger, C.J., and Powell and Rehnquist, JJ.) for AGNS to have again pursued licensing proceedings for commercial reprocessing at BNFP.

ated a "catch 22" by failing even to consider whether the open-ended moratorium has extended so long that it works a taking because it does not "substantially advance legitimate state interests" (*Nollan*, 107 S.Ct. at 3146-3147). The only statement in the opposition on this point is (Opp. 14 n.8):

And, of course, the mere fact that there has been a change of presidential policy does not mean that the preceding policies were not valid and lawful. For present purposes, therefore, the Court must assume that the Commission has always acted reasonably and within the confines of the AEA.

The government simply tells this Court that it "must" assume the validity of the continuing moratorium. We disagree.

The original 1977 moratorium not only has been rescinded by President Reagan. Its continuing maintenance by the Commission also violates the Third Circuit's ruling in *Westinghouse* that an "open-ended moratorium" of "unreasonable duration" would be invalid. See 598 F.2d at 774. Neither reason nor authority supports the government's bald assertion that this Court "must" ignore *Nollan* and simply assume that "the Commission has always acted reasonably and within the confines" of the licensing statute (Opp. 14 n.8). The Court of Appeals decision, and the evasive opposition, are squarely in conflict with *Nollan*.

For the foregoing reasons, and the reasons stated in our petition, certiorari should be granted.

Respectfully submitted,

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